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EXAMINER

VASAT, PETER S

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte DONALD CARROLL ROE and
MARK JAMES KLINE

Appeal 2017-000419
Application 13/034,800
Technology Center 3700

Before: CHARLES N. GREENHUT, THOMAS F. SMEGAL, and
PAUL J. KORNICZKY, *Administrative Patent Judges*.

GREENHUT, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Appellants appeal under 35 U.S.C. § 134 from a rejection of claims 1, 2, 4, 6, and 8–20. We have jurisdiction under 35 U.S.C. § 6(b).

We affirm.

CLAIMED SUBJECT MATTER

The claims are directed to an absorbent article with improved garment-like character. Claim 1, reproduced below, is illustrative of the claimed subject matter:

1 A disposable absorbent article comprising:

a) a chassis having a longitudinal axis, a transverse axis, a front region with a front edge, a rear region with a back edge, a crotch region between the front region and the rear region, and a pair of opposing longitudinal edges, said chassis comprising an absorbent core having front and back edges wherein said absorbent core contains less than 10% by weight of the absorbent core of cellulosic fibers;

b) left and right discrete elastically elongatable ears that are formed as separate elements and are joined to said chassis, each of said left and right ears having upper and lower edges and a transverse axis, each of said upper and lower edges having proximal and distal ends wherein said upper and lower edges of said elastically elongatable ears are asymmetric relative to the transverse axis of the elastically elongatable ears, wherein said left ear is a mirror image of said right ear relative to the longitudinal axis of said chassis; and

c) left and right fastening tabs respectively connected to a distal portion of said left and right elastically elongatable ears, each of said left and right fastening tabs having upper and lower edges and a transverse axis, each of said upper and lower edges having a proximal end, wherein said left fastening tab is a mirror image of said right fastening tab relative to the longitudinal axis of said chassis, wherein said upper and lower edges of said fastening tabs are asymmetric relative to the transverse axis of the fastening tabs and wherein the distance between the upper and lower distal ends of said left elongatable back ear is the same as the distance between the upper and lower proximal ends of said left fastening tab and the distance between the upper and lower distal ends of said right elongatable back ear is the same as the distance between the upper and lower proximal ends of said right fastening tab, wherein the transverse axis of the elongatable ears is offset relative to the transverse axis of the

fastening tabs, and wherein the transverse axis of the elongatable ears and the transverse axis of the fastening tabs are separated by a distance of at least 20 mm.

REFERENCES

The prior art relied upon by the Examiner in rejecting the claims on appeal is:

Feist	US 6,142,985	Nov. 7, 2000
Ehrnsperger	US 2007/0088308 A1	Apr. 19, 2007
Becker	US 2007/0156108 A1	July 5, 2007

REJECTIONS

Claims 1, 2, 4, 6, 8, and 9 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Feist (US 6,142,985) in view of Ehrnsperger (PGPub 2007/0088308).

Claims 10–20 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Feist in view of Ehrnsperger, and further in view of Becker.

OPINION

All arguments are premised on the patentability of claim 1. Regarding claim 1, the Examiner found Feist to disclose the basic article claimed with some exceptions as discussed at pages 3–4 of the Final Action. The Examiner’s findings in this regard are not disputed. The Examiner and Appellants agree as to the absence of ears “formed as separate elements” in Feist. The Appellants and the Examiner also agree as to the presence of such ears in Ehrnsperger. Final Act. 5; App. Br. 6. However, Appellants contend that

one skilled in the art would only reasonably look at references that teach a diaper with discrete elastically elongatable ears. Accordingly, there is no motivation to look to, combine, or alter any references that teach diapers with integral ears, and thus there is no motivation to look to, combine, or alter the Feist reference.

App. Br. 6. We agree with the Examiner that Appellants' position in this regard is directly contradicted by the cited evidence of record. *See* Ans. 4 ("Ehnsperger teaches 'side panels 154 could be integral with the chassis or be separately attached' in Paragraph [0052]."). Ehnsperger itself demonstrates that teachings relating to absorbent articles with integral or separate ears are not mutually exclusive. The Examiner also sets forth a detailed analogous-art analysis (Ans. 2-4), which Appellants do not rebut with any argument or evidence. We adopt the Examiner's analysis in that regard as our own.

The Examiner and the Appellants also agree that there is no express disclosure in Feist or Ehmsperger regarding the ear-tab separating distance of claim 1 ("at least 20mm"). Ans. 6; App. Br. 5. The Examiner takes a multifaceted approach to addressing this limitation.

First the Examiner notes the portion of the Appellants' disclosure describing this limitation does not express any criticality nor has any criticality been introduced into the record. Final Act. 6 (alluding to, without express citation (until addressing the dependent claims at Final Act. 15, 19), MPEP 2144.05 and cases cited therein). Appellants do not respond to this position.

Second, the Examiner continues on to discuss that, although the particular dimension in question is not expressly described by Feist, a number of other dimensions are expressly mentioned, and based on those

other dimensions, Feist's figure 1 (reproduced with annotation at Final Act. 7) "reasonably suggests" an ear-tab separating distance within the range recited in claim 1. Final Act. 7–8. Without any further support, or rebuttal of the specific analysis provided by the Examiner, Appellants take issue with the Examiner's reliance on Figure 1 of Feist as "reasonably suggesting" a value within the "at least 20mm" range. App. Br. 5; Reply Br. 2.

The Examiner also presents a third position regarding this limitation, articulating reasoning as to why, if Feist is not considered to disclose an arrangement falling within this limitation, it would have been obvious to modify the device resulting from the combined teachings of Feist and Ehrnsperger such that the "at least 20 mm" limitation is satisfied. *See* Final Act. 9. Appellants also provide no response to this position.

With regard to the Examiner's second position concerning the "at least 20 mm" distance, we recognize that deducing information from figures is a delicate balancing act. On the one hand, patent drawings are not necessarily drawn to scale. *Hockerson-Halberstadt, Inc. v. Avia Group Int'l*, 222 F.3d 951, 956 (Fed. Cir. 2000). On the other hand, as the Examiner correctly points out, "[t]he drawings must be evaluated for what they reasonably disclose and suggest to one of ordinary skill in the art." Final Act. 8 (citing *In re Aslanian*, 590 F.2d 911 (CCPA 1979); *see also In re Mraz*, 455 F.2d 1069, 1072 (CCPA 1972)) ("Patent drawings are not working drawings * * *"). However, we did not mean that things patent drawings show clearly are to be *disregarded*.) (citations omitted). This situation certainly presents a close question of what is clearly or reasonably disclosed based on the combined disclosure of certain dimensions in Feist and the illustration in Figure 1. Perhaps that is why the Examiner articulated two other rationales

to address this limitation. By not addressing the specific points raised by the Examiner regarding this second position, or the Examiner's other two rationales, Appellants' arguments do little to point out the supposed errors in the Examiner's position. *See* 37 C.F.R. § 41.37(c)(iv) ("The arguments shall explain why the examiner erred as to each ground of rejection contested by appellant"). Thus, even were we to agree with Appellants concerning the Examiner's second position, we would remain unapprised of error warranting reversal of the Examiner's rejection because the Examiner's alternate and compelling positions on this issue stand uncontroverted.

DECISION

The Examiner's rejections are affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a). *See* 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED